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**IN THE  
COURT OF APPEALS OF INDIANA**

PATRICK DAVIS,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0710-CR-894

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable John W. Hammel, Judge  
Cause No. 49F24-0604-FD-67672

**June 5, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Patrick Davis appeals his conviction for Theft, as a Class D felony, following a jury trial. He presents two issues for our review:

1. Whether the trial court's exclusion of Davis' codefendant's testimony at trial violated the Sixth Amendment to the United States Constitution.
2. Whether the trial court abused its discretion when it instructed the jury.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On April 14, 2006, Davis and James Swanson were arrested for stealing a digital thermostat from a Menards in Indianapolis. The State charged Davis with theft, as a Class D felony. On the first day of trial, the State moved to exclude the testimony of Swanson because the State had not had an opportunity to depose or question him. The trial court granted that motion over Davis' objection. The jury found Davis guilty as charged, and the trial court entered judgment and sentence accordingly. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Issue One: Sixth Amendment**

Davis first contends that the trial court's exclusion of Swanson's testimony violated the Sixth Amendment, but we do not reach that issue. It is well settled that an offer of proof is required to preserve an error in the exclusion of a witness' testimony. Dowdell v. State, 720 N.E.2d 1146, 1150 (Ind. 1999). Here, Davis did not make an offer of proof setting out Swanson's anticipated testimony. As such, the issue is waived.

## **Issue Two: Jury Instruction**

Davis contends that the trial court abused its discretion in giving the following instruction over his objection:

While mere presence at the scene of the crime, by itself, is insufficient to infer participation, presence may be considered with other evidence in determining guilt. The jury may infer participation from the defendant's failure to oppose the action, companionship with another participant, conduct before and after the charged offense, or other behavior the jury believes probative of the issue.

Appellant's App. at 73. Davis objected to that instruction, which, according to Davis on appeal, was derived from this Court's opinion in Young v. State, 176 Ind.App. 32, 373 N.E.2d 1108 (1978). Young is still good law.

On appeal, Davis maintains that the instruction "misled the jury." In particular, Davis states:

The instruction instructed the jury that it could find participation by evidence that would normally not be sufficient to prove guilt beyond a reasonable doubt. It eased the evidentiary burden the State must overcome to prove guilt beyond a reasonable doubt and pointed too much attention to actions that prove nothing. The instruction misled the jury and it was error for the trial court to give the instruction to the jury.

Brief of Appellant at 9-10. We cannot agree.

The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. Ct. App. 2003), cert. denied, 540 U.S. 1150 (2004). Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. Id. at 1163-64. In reviewing a trial court's decision to give or refuse tendered jury

instructions, this Court considers: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions which are given. Guyton v. State, 771 N.E.2d 1141, 1144 (Ind. 2002).

Here, the instruction correctly states the law.<sup>1</sup> Indeed, we upheld a similar instruction on accessory liability in Cohen v. State, 714 N.E.2d 1168 (Ind. Ct. App. 1999), trans. denied. That instruction read, in pertinent part:

The presence of the defendants at the time and place of a crime alleged to have been committed by the defendants' companions would not itself render the defendants guilty under this accessory principle of law. But presence of a person at the scene, companionship with other persons engaged in the offense, and a course of conduct before and after the offenses are circumstances which may be considered.

The instruction at issue here is substantially the same as the instruction we approved in Cohen.

Further, “[j]ury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case.” Edgecomb v. State, 673 N.E.2d 1185, 1196 (Ind. 1996). Here, in addition to the challenged instruction, the trial court properly instructed the jury on the State’s burden of proof on each element of the offense. Davis’ contention that the instruction misled the jury on the State’s burden of proof is without merit.<sup>2</sup>

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<sup>1</sup> Davis does not dispute that the evidence supports the giving of the instruction, and he does not contend that the substance of the instruction is amply covered by other instructions.

<sup>2</sup> Davis also contends that “[t]he trial court’s issuance of [the] State’s instruction constituted fundamental error because the instruction is captioned “‘State’s Final Instruction.’” Brief of Appellant at

Affirmed.

DARDEN, J., and BROWN, J., concur.

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10. But Davis does not support that contention with citation to authority or cogent argument. As such, the issue is waived.